

1 BROWN, WEGNER & BERLINER LLP
2 Matthew A. Berliner (SBN 224384)
3 mberliner@bwb-lawyers.com
4 Janet S. Park (SBN 263511)
5 jpark@bwb-lawyers.com
6 2603 Main Street, Suite 1050
7 Irvine, CA 92614
8 Tel: 949-705-0080 Fax: 949-794-4099

9 Attorneys for Defendant/Cross-Complainant
10 3PL Systems, Inc.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

WALTER L. MITCHELL, III, an
individual,

Plaintiff,

v.

3PL SYSTEMS, INC., a California
Corporation,

Defendants.

Case No.: SACV11-00534 AG(ANx)

Hon. Andrew J. Guilford
Courtroom 10D

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
3PL SYSTEM INC.'S EX PARTE
APPLICATION FOR AN ORDER
GRANTING EXPEDITED
DISCOVERY BEFORE RULE 26
CONFERENCE OR IN THE
ALTERNATIVE AN ORDER
SHORTENING TIME ON A
MOTION FOR EXPEDITED
DISCOVERY**

ALL RELATED CROSS ACTIONS

1 **I. INTRODUCTION**

2 Defendant/Cross-Complainant 3PL SYSTEMS, INC. ("3PL") is seeking to
3 expedite the discovery process by three weeks due to Cross-Defendants' actions
4 causing 3PL irreparable injury to its business, as well as issues involving
5 continuing infringement of a copyright. 3PL seeks additional evidence in order to
6 prepare a preliminary injunction against Cross-Defendants, and hereby requests the
7 Court's leave to propound discovery requests and depose Plaintiff/Cross-Defendant
8 WALTER L. MITCHELL, III ("Mitchell").

9 Federal Rule of Civil Procedure 26(d)(1) provides that no discovery shall
10 commence before the conference of the parties twenty-one days before the initial
11 scheduling conference. The initial scheduling conference in this case is currently set
12 for August 1, 2011. Under Rule 26(d), 3PL may begin propounding discovery
13 requests upon Cross-Defendants twenty-one days prior, on July 11, 2011, the date
14 by which the parties are to confer in preparation for the conference. 3PL seeks to
15 advance the propounding of *limited* discovery by approximately 3 weeks. Plaintiff
16 also seeks to shorten the response time for production of documents and depositions
17 from certain Cross-Defendants to ten days.

18 Alternatively, 3PL is requesting that this Court shorten the time for hearing
19 on a noticed motion for expedited discovery pursuant to Local Rule 6-1 ("The
20 Court may order a shorter time [on notice and service of motion]."). If 3PL brings a
21 regular noticed motion for expedited discovery, 3PL will need to wait another 4
22 weeks, essentially making 3PL's motion moot. 3PL is continually being harmed by
23 the actions of Cross-Defendants. In order to get any relief, 3PL requires more
24 evidence in order to file a preliminary injunction against Cross-Defendants.

25 As shown below, there exists good cause for this Court to grant 3PL's
26 request for expedited discovery.

27
28 ///

1 **II. BACKGROUND FACTS**

2 During the time period of 2000 through March 17, 2011, Plaintiff/Cross-
3 Defendant Mitchell was employed by 3PL. See 3PL's Cross-Complaint ¶16.
4 Mitchell was hired by 3PL to further develop a software package ("the software")
5 that aids in transportation management for freight companies. Cross-Complaint ¶
6 15. Before Mitchell was hired by 3PL, Mitchell worked for a car-manufacturing
7 company, and had no knowledge of freight transportation management systems. At
8 some point during 2005 to 2011, during his employment with 3PL, Mitchell
9 decided to implement a scheme to steal 3PL's software and 3PL's customers in
10 order to start a competing business. His scheme involved wrongfully registering the
11 software under his name with the U.S. Copyright Office in 2005, then stealing
12 3PL's confidential customer lists and proprietary information from 3PL's computer
13 systems, contacting 3PL customers without authorization, and eventually forming
14 his own company and soliciting 3PL customers away from 3PL. Cross-Complaint
15 ¶¶ 23-27. After Mitchell was fired on March 17, 2011, Mitchell hired two of 3PL's
16 employees for the purpose of helping Mitchell with his newly formed competing
17 company TRINNOS TECHNOLOGIES, INC. ("Trinnos"). Cross-Complaint ¶ 35.
18 These former 3PL employees who are helping Mitchell are current Cross-
19 Defendants JONATHAN LANSAGAN ("Lansagan") and CHRISTOPHER
20 VINCIGUERRA ("Vinciguerra"). 3PL believes that Lansagan and Vinciguerra
21 were actually working for and on Mitchell's behalf prior to leaving 3PL
22 employment. Upon their departure, Lansagan and Vinciguerra deleted their emails
23 and other electronically stored files from 3PL's computer systems. Cross-
24 Complaint ¶ 115.

25 In March 2011, after Mitchell's employment with 3PL was terminated for
26 wrongful conduct, Mitchell hacked into 3PL's computer systems and deleted 3PL's
27 computer files, tampered and altered 3PL's computer files, blocked access to 3PL's
28

1 computer system, and sent unauthorized emails from 3PL's email server to third
2 parties. Cross-Complaint ¶ 31.

3 In furtherance of his scheme, Mitchell immediately thereafter filed his
4 Copyright Infringement lawsuit against 3PL in order to get a judicially determined
5 taking of the software that was developed for 3PL and owned by 3PL, and also to
6 harass and cause 3PL's business to be further disrupted. Mitchell's complaint filed
7 on April 7, 2011 is the original complaint that forms the start of this litigation.

8 About one month later, in May 2011, 3PL learned that Mitchell was
9 soliciting business from 3PL's current customers. 3PL received notice from a
10 significant amount of their current customers that they were terminating their
11 licensing agreements with 3PL and taking their business to Trinnos. According to
12 3PL's customers, Trinnos was offering a software package identical to 3PL's
13 software package. This software package is the main product marketed and sold by
14 3PL. Trinnos' unauthorized use and licensing to third parties has been and is
15 currently causing irreparable damage to 3PL. 3PL has been and is continually
16 facing irreparable harm to its business due to Cross-Defendants' actions, including
17 loss of revenue, loss of customers, loss of reputation and goodwill, and loss in
18 value. 3PL seeks expedited discovery in order to find out the extent of knowledge
19 of its previous employees including the extent of confidential information in the
20 possession of its former employees, and the extent of any future damage that could
21 be done to 3PL by Cross-Defendants. 3PL also anticipates seeking a preliminary
22 injunction against Cross-Defendants.

23 **III. ARGUMENT**

24 There exists good cause for 3PL's request for expedited discovery. "[C]ourts
25 may permit expedited discovery before the Rule 26(f) conference upon a showing
26 of good cause." *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F.Supp.2d
27 1160, 1179 (C.D. Cal. 2008); *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D.
28 273, 276 (N.D. Cal. 2002); *see also Qwest Commc'ns Int'l, Inc. v. WorldQuest*

1 *Networks, Inc.* 213 F.R.D. 418, 419 (D. Colo. 2003) (The “party seeking expedited
2 discovery in advance of [the] Rule 26(f) conference has the burden of showing
3 good cause for the requested departure from usual discovery procedures.”) Courts
4 within the Ninth Circuit may use the “good cause” standard to determine whether to
5 permit expedited discovery. *See Semitool, Inc. v. Tokyo Electron America, Inc.*, 208
6 F.R.D. 273, 276 (N.D. Cal. 2002). “Good cause may be found where the need for
7 expedited discovery, in consideration of the administration of justice, outweighs the
8 prejudice to the responding party.” *Semitool*, 208 F.R.D. at 276.

9 In determining whether good cause justifies expedited discovery, courts
10 consider factors including: “(1) whether a preliminary injunction is pending; (2) the
11 breadth of the discovery requests; (3) the purpose for requesting the expedited
12 discovery; (4) the burden on the defendants to comply with the requests; and (5)
13 how far in advance of the typical discovery process the request was made.”

14 *American LegalNet, Inc. v. Davis*, 673 F.Supp.2d 1063, 1067 (C.D. Cal. 2009).

15 Here, all of the factors tip in 3PL’s favor. Although no motion for
16 preliminary injunction is pending, Courts have found that expedited discovery may
17 be justified to allow a party to determine whether to seek an early injunction. *Apple*
18 *Inc. v. Samsung Electronics Co., Ltd.* 2011 WL 1938154, at *2 (N.D. Cal. 2011);
19 *see also Interserve, Inc. v. Fusion Garage PTE, Ltd.*, No. C 09–05812 JW (PVT),
20 2010 WL 143665, at *2 (N.D. Cal. 2010)(“Expedited discovery will allow plaintiff
21 to determine whether to seek an early injunction.”). 3PL anticipates seeking a
22 preliminary injunction but needs additional evidence in support of enjoining Cross-
23 Defendants. This evidence needs to be discovered expediently due to 3PL
24 continually facing damage stemming from Cross-Defendants’ actions.

25 3PL’s discovery requests are narrowly drawn. As explained below, 3PL’s
26 Request for Production of Documents and Things asks for information pertaining to
27 3PL’s customers and Trinnos’ software package, which narrowly relate to 3PL’s
28 damages to date and potential damages in the near future. The proposed Request for

1 for Production of Documents and Things to Trinnos and Mitchell are attached
2 herein as Exhibit "B." Also, 3PL's Notice of Deposition is narrowly drawn, seeking
3 information regarding 3PL's customer information and software package only,
4 from Mitchell only. The proposed Notice of Deposition for Mitchell is attached
5 herein as Exhibit "C."

6 3PL's purpose in seeking expedited discovery is to quickly prevent further
7 damage to its business. 3PL has been and continues to be irreparably harmed by
8 Cross-Defendants, and 3PL needs to be enabled to more fully develop the evidence
9 prior to the conduct of a preliminary injunction hearing. 3PL should have the
10 opportunity to supplement a complete evidentiary record prior to seeking a
11 preliminary injunction. Also, expedited discovery is vital in determining the scope
12 of fraud and damage done to 3PL. Accordingly, 3PL requests documents and
13 depositions on notice of 10 days, with notice as provided as noted in the next
14 section.

15 The burden on the Cross-Defendants is very light and almost non-existent.
16 Mitchell first brought his lawsuit with full knowledge of the aspects of 3PL's
17 software program, and the implication of initiating litigation. Mitchell cannot claim
18 that he is not ready for discovery requests and depositions when he filed his lawsuit
19 in April 7, 2011. All Cross-Defendants should have all the information they need in
20 their immediate possession in order to respond to 3PL's discovery requests and
21 should not need additional time to prepare for depositions. Cross-Defendants
22 cannot claim any prejudice or surprise.

23 The start of official discovery commences in July 11, 2011. 3PL is only
24 asking for approximately 3 weeks advance of the start of discovery, and for the
25 narrow purpose of finding out the extent that they can be damaged.

26 Further, this case involves sophisticated parties and counsel who have had
27 ongoing communications regarding the software dispute between the parties and the
28 possibility of expedited discovery. 3PL's counsel has given previous notice to

1 Mitchell's counsel that 3PL will seek expedited discovery. Declaration of Berliner ¶
2 2; Exhibit "A." Mitchell knew that 3PL will seek expedited discovery since June 2,
3 2011. *See Semitool*, 208 F.R.D. at 276–77 (indicating that relevance of the
4 discovery requested, sophistication of parties and counsel, prior notice of discovery
5 requests, and facilitation of case management support a request for expedited
6 discovery). Expedited discovery would allow the Court to address any request for
7 preliminary injunctive relief at the very beginning of this case, thereby facilitating
8 case management and moving the case along. The limited discovery requests
9 proposed by 3PL are directly relevant to the claims in the case at hand. No other
10 discovery has been propounded.

11 Thus, all of the factors that this Court may consider tip in favor of granting
12 3PL's request for expedited discovery, which should therefore be granted.

13 **IV. PROPOSED EXPEDITED DISCOVERY**

14 **A. EXPEDITED PRODUCTION OF DOCUMENTS AND THINGS**
15 **TO TRINNOS TECHNOLOGY LLC for the following:**

16 All customer lists; all communications to and from customers from March
17 17, 2011 to the present; all invoices to customers; communications between its
18 employees; a sample licensing agreement for its transportation management
19 software package to its customers; and a digital copy of its transportation
20 management software package being licensed to its customers. *See* Exhibit "B."

21 3PL requests that Trinnos be required to respond to 3PL's Request for
22 Production of Documents and Things on or before 10 days after the date of the
23 Court's execution of an order granting 3PL's application.

24 **B. EXPEDITED PRODUCTION OF DOCUMENTS AND THINGS**
25 **TO TRINNOS TECHNOLOGY LLC for the following:**

26 All documents Mitchell took from 3PL; all communications between Mitchell
27 and 3PL's customers from January 1, 2011 to the present; communications between
28 Mitchell and Trinnos' employees; a sample licensing agreement for his

1 transportation management software package to Trinnos' customers; a digital copy
2 of Trinnos' transportation management software package being licensed to Trinnos'
3 customers; and documents pertaining to Mitchell's copyright applications. *See*
4 Exhibit "B."

5 3PL requests that Mitchell be required to respond to 3PL's Request for
6 Production of Documents and Things on or before 10 days after the date of the
7 Court's execution of an order granting 3PL's application.

8 **C. EXPEDITED DEPOSITION OF WALTER L. MITCHELL III**
9 **regarding the following matters:**

10 Information regarding the information taken from 3PL's computer systems;
11 Information regarding 3PL's customers; communications with 3PL's customers;
12 communications with other Cross-Defendants regarding 3PL's software and
13 Trinnos' software; information regarding 3PL's software package; information
14 regarding Mitchell's copyright applications; and information regarding Trinnos'
15 software package. *See* Exhibit "C."

16 3PL requests that Mitchell be ordered to appear for deposition on or before
17 10 days after the date of the Court's execution of an order granting 3PL's
18 application.

19 **V. THE PARTIES**

20 Pursuant to L.R. 7-19, the name, address, telephone number and email
21 address of all known counsel and *pro se* parties in this litigation are as follows:
22
23
24
25

26 ///

27 ///

28 ///

1 Attorneys for Plaintiff WALTER L. MITCHELL III:

2 Joseph A. Mandour III
3 Email: jamandour@mandourlaw.com
4 Gordon E. Gray
5 Email: ggray@mandourlaw.com
6 Ben T. Lila
7 Email: blila@mandourlaw.com
8 MANDOUR & ASSOCIATES, APC
9 16870 West Bernardo Drive, Suite 400
10 San Diego, CA 92127
11 Tel: 858-487-9300 Facsimile: 858-487-9390

12 Cross-Defendant TRINNOS TECHNOLOGY LLC in *Pro Se*

13 Trinnos Technology LLC's Agent for service of Process
14 c/o Nancy B. Hersman, A Law Corporation
15 1334 Parkview Ave, #230
16 Manhattan Beach, CA 90266
17 Telephone: 310-545-7700; Facsimile: 310-545-7095
18 Email: nancy@sbbmb.com

19 Cross-Defendant JONATHAN LANSAGAN in *Pro Se*

20 1201 Virtouso
21 Irvine, CA 92620
22 Telephone: unknown; Facsimile: unknown
23 Email: unknown

24 Cross-Defendant CHRISTOPHER VINCIGUERRA in *Pro Se*

25 2635 Goldfinch Drive
26 Cedar Park, Texas 78613
27 Telephone: unknown; Facsimile: unknown
28 Email: unknown

29 Counsel for 3PL sent a letter to each party notifying them of this ex parte
30 application via facsimile, email, and overnight delivery. Declaration of Berliner ¶¶
31 5-7; Exhibits "D," "E," and "F."

1 **VI. CONCLUSION**

2 For the foregoing reasons, 3PL respectfully requests that the Court issue an
3 order requiring Cross-Defendants to expedite responses to Plaintiff's Request for
4 Production of Documents and Notice of Deposition as attached herein, according to
5 the schedule in the Proposed Order filed herewith.

6 Alternatively, 3PL seeks an order shortening time for hearing its motion for
7 expedited discovery, setting a hearing date within 10 days of the Court's ruling.
8

9 DATED: June 12, 2011

BROWN, WEGNER & BERLINER LLP

10
11 By: 

12 Matthew A. Berliner

13 Janet S. Park

14 Attorneys for Defendant

15 3PL Systems, Inc.
16
17
18
19
20
21
22
23
24
25
26
27
28